



## **Case Summary**

Kevin Brown (“Father”) appeals an order modifying his parenting time and child support for his two children with Danielle (Brown) Pitzer-Brandon (“Mother”). We affirm.

## **Issues**

Father raises five issues:

- I. Whether the trial court restricted Father’s parenting time absent compliance with the statutory criteria of Indiana Code Section 31-17-4-2;
- II. Whether the trial court abused its discretion by denying Father’s request for make-up parenting time;
- III. Whether the trial court erred in calculating Father’s child support arrearage because an inadequate parenting time credit was applied;
- IV. Whether the trial court erred in calculating Father’s child support because the Guideline amount was not modified to reflect Father’s higher tax bracket; and
- V. Whether the trial court abused its discretion by failing to award Father attorney’s fees incurred due to Mother’s contempt of court.

## **Facts and Procedural History**

Mother and Father were married on January 2, 1988 and divorced on June 18, 1996. They are the parents of S.B. (born January 27, 1991) and D.B. (born December 3, 1993) (“the Children”). The dissolution decree provided that Mother and Father were to share joint legal custody, and Mother was to have primary physical custody of the Children. Father was ordered to pay \$225.00 per week as child support. He was to exercise 132 days annually as parenting time with the Children.

During 2004, a dispute arose over physical custody of the Children and D.B.'s soccer participation. On September 15, 2004, Mother filed her Petition to Modify Decree, seeking sole legal custody of the Children, an alteration of the parenting time schedule, and modification of the child support order. On October 20, 2004, Father filed a petition to modify custody and a petition for a contempt citation against Mother. On May 5, 2005, the trial court conducted a preliminary hearing and ordered a custody evaluation to be performed by Dr. Shelvy Keglär ("Dr. Keglär").

On October 5, 2005, Judge David Welch issued an order modifying the existing parenting time schedule to the extent necessary to accommodate D.B.'s soccer schedule. Father filed a second petition for contempt and the trial court held a hearing on that petition on November 22, 2005. At that hearing, Judge Welch clarified that parenting time with S.B. should continue under the terms of the existing decree.

Following Dr. Keglär's recommendation that Mother retain the physical custody of S.B. and D.B., Father withdrew his petition for custody modification. On March 6, 2006, Judge Stephen Galvin accepted the case, with the parties' agreement, and conducted a hearing on the remaining issues of parenting time, child support, allegations of contempt, and attorney's fees.

On May 9, 2006, the trial court entered an order reducing Father's parenting time consistent with the Indiana Parenting Time Guidelines ("Parenting Time Guidelines"), increasing his child support payments to \$276.19 weekly, and ordering him to transport D.B. to soccer games and practices conducted during his parenting time. The trial court found Mother in contempt, but did not impose specific sanctions. Father now appeals.

## **Discussion and Decision**

### **I. Parenting Time Modification**

#### **A. Standard of Review**

At the outset, we note that the trial court entered specific findings pursuant to Indiana Trial Rule 52(A). Thus, while deciding whether the trial court abused its discretion, we must also determine whether the trial court's judgment is supported by the conclusions and whether those conclusions are supported by the findings. In re Paternity of A.M.C., 768 N.E.2d 990, 1000 (Ind. Ct. App. 2002). We may affirm the trial court's judgment on any theory supported by the findings. Id. at 1001. Nevertheless, because a judgment entered with findings pursuant to a Trial Rule 52 request is not a general judgment, we may not affirm the judgment merely because it is supported by evidence in the record. Id. Rather, we must determine whether the findings outlined by the trial court are sufficient to support the judgment. Id.

We will not set aside the findings of the trial court unless they are clearly erroneous. Id. at 997. Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences to support them. Id. When reviewing findings, we will consider only the evidence most favorable to the findings, and will neither reweigh the evidence nor assess the credibility of the witnesses. Id.

#### **B. Analysis**

Father challenges the trial court's implementation of the Parenting Time Guidelines as well as the order to transport D.B. to soccer events.<sup>1</sup> He contends that these orders are "restrictions" of his parenting time within the meaning of Indiana Code Section 31-17-4-2, which provides:

The court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child. However, the court shall not restrict a parent's parenting time rights unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development.

Father argues that the trial court's modification order must be accompanied by a specific finding that the continuation of the prior parenting time order might endanger the Children's physical health or significantly impair their emotional development. Mother responds that the term "restriction" in the foregoing statute does not encompass routine or minor alterations to a parenting time schedule. In her view, Father's parenting time rights are not restricted.

When interpreting a statute the words and phrases are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself. State v. Eilers, 697 N.E.2d 969, 970 (Ind. Ct. App. 1998). The word "restriction" in this context is not defined. However, we observe that the statute speaks to a restriction of "parenting time rights" and not a mere restriction of time. In previous decisions of this Court, parenting time rights have been considered "restricted" when a parent has been granted only supervised parenting time, J.M. v. N.M., 844 N.E.2d 590, 595 (Ind. Ct. App. 2006), trans. denied, and

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<sup>1</sup> Although the trial court also specified that Father was to transport S.B. to theatre practices, Father does not challenge this term of the modification order. Father testified that he was the person who involved S.B. in her theatre group.

when the trial court ordered that a father was not entitled to parenting time with one child if his other child was present, Barger v. Pate, 831 N.E.2d 758, 763 (Ind. Ct. App. 2005).

Here, Father is to have unsupervised parenting time consistent with the Parenting Time Guidelines. He is to transport each of his children to one activity – D.B. to soccer and S.B. to theatre rehearsals – activities aptly characterized by the trial court as “normal childhood activities.” We agree with Mother that an absurd result would ensue if we interpreted the statutory language at issue to encompass all time reductions as well as normal circumstances generally present in the exercise of parenting time. The trial court was not required to find that the Children’s mental or physical health might be impaired or endangered before ordering Guideline-based parenting time, with the condition that Father transport the Children to childhood activities.

## II. Make-up Time

The record reveals that there was a significant period of time during which Father and Mother disagreed as to whether D.B. should participate in soccer during Father’s scheduled parenting time. The record further reveals that D.B. refused to go to Father’s home on multiple occasions after Father indicated an unwillingness to transport D.B. to soccer practices and games. At the contempt hearing, Father unsuccessfully requested make-up time for the missed visitations.

Father does not claim an absolute entitlement to make-up time or cite authority to that effect. In essence, he alleges that Mother’s contemptuous behavior in denying him parenting time is the sole cause of the missed time and should be fully redressed. However, the trial

court specifically found that each parent contributed to the problem. There is evidentiary support for the trial court's findings of fact. Indeed, Father testified as follows:

Question: In the summer of 2004, after reasonably getting along for a couple of years and accommodating soccer and giving, taking, accommodating and compromising, you flat told your wife, I'm sorry, you flat told Danielle that you would no longer accommodate [D.B.]'s soccer schedule because she would not give you physical custody, isn't that true sir?

Father: I'm going to say this again, in the summer we moved from Indianapolis to Bloomington.

Question: Did you tell her this sir, that you no longer would accommodate [D.B.]'s schedule because she would not give you custody?

Father: Yeah, I may have. I may have.

Question: When you were in court before you flat said you did.

Father: Okay, I may have. As I said, I'm not saying that I didn't.

(Tr. 227-28.) The trial court observed that Mother failed to comply with the parenting time provisions of the Dissolution Decree, but also recognized that the missed parenting time was caused by multiple factors: Father's retaliatory refusal to accommodate D.B.'s soccer schedule, D.B.'s refusal to forfeit soccer and visit Father, and Mother's refusal to override D.B.'s wishes. Accordingly, Father has demonstrated no abuse of discretion in the trial court's refusal to award him make-up time as a means of redressing contemptuous actions on the part of Mother.

### III. Calculation of Child Support

The trial court modified Father's child support from \$225.00 to \$276.19 weekly. The trial court's calculation was based upon Father's income of \$2,942.31 weekly, Mother's imputed income of \$1,519.23 weekly,<sup>2</sup> and a parenting time credit of \$74.99 (based on 98 overnights). Father contends that, with respect to arrearage created by making the order retroactive to the date of filing for modification, the parenting time credit is inadequate because his prior parenting time award was 132 overnights annually.<sup>3</sup>

The Indiana Child Support Guidelines ("Child Support Guidelines") do not specify the parenting time credit applicable to retroactive orders when the prospective amount of parenting time has been reduced to implement the Parenting Time Guidelines and when there is a difference between the past overnights awarded and overnights actually exercised. However, the Commentary to Child Support Guideline 6 provides in pertinent part "Parenting Time Credit is not automatic." Therefore, we consider this to be a matter within the sound discretion of the trial court.

The parenting time credit was implemented in recognition of the fact that a parent exercising parenting time will incur out-of-pocket expenses. See Commentary to Child Support Guideline 4. The parties agreed that Father did not actually incur out-of-pocket expenses on 132 nights of each year. Moreover, they agreed that Father is entitled to some parenting time credit. They disagreed as to the appropriate amount of the credit.

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<sup>2</sup> At Father's request, the trial court imputed income to Mother based upon her expectable earnings if she were still employed in a field utilizing her Masters in Business Administration.

<sup>3</sup> We observe that, although a court may not retroactively reduce, modify or vacate a support order, it is empowered to make a discretionary modification relating back to the filing date of the petition to modify. See Donegan v. Donegan, 586 N.E.2d 844, 846 (Ind. 1992).

Mother asked that Father be credited with 78 overnights, and her child support worksheet reflected a parenting time credit of \$37.69. Father testified that he had been awarded 132 overnights. He submitted into evidence alternative child support worksheets, reflecting credits ranging from \$78.31 weekly (based on 104 overnights) to \$169.50 (based on 170 overnights).<sup>4</sup> Thus, the difference between the credit awarded (\$74.99) and Father's lowest credit suggested (\$78.31) is a mere \$3.32 per week. This appears to be a negligible deviation given Father's annual income of \$153,145.72. The trial court's decision to award credit for 98 overnights was within the range of the evidence presented and therefore does not constitute an abuse of discretion.

#### IV. Deviation from Guidelines Based Upon Income Tax Bracket

Father asserts that the Child Support Guidelines assume a total tax rate of 21.88% and his personal tax rate is higher; thus, the trial court should have deviated from the Guideline amount for child support.

Pursuant to Indiana Child Support Guideline 2, there is a rebuttable presumption that the amount of the award resulting from the application of the Guidelines is the correct amount of child support to be awarded. As such, it is incumbent upon the parent seeking a deviation from the Child Support Guidelines to submit admissible evidence to support the deviation. See Willard v. Peak, 834 N.E.2d 220, 225 (Ind. Ct. App. 2005), reh'g denied. Here, Father did not proffer evidence demonstrating his actual tax rate and the amount of its

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<sup>4</sup> Neither parent submitted a separate worksheet for the purpose of calculating arrearage as opposed to prospective child support.

deviation, if any, from a rate assumed in formulating the Child Support Guidelines. Thus, he has not demonstrated an abuse of the trial court's discretion in this regard.<sup>5</sup>

#### V. Attorney's Fees

Finally, Father claims that he should have been awarded attorney's fees because he was required to file multiple motions for contempt alleging Mother's violation of the parenting time provisions of the Dissolution Decree and interim orders issued in 2005 and 2006.

An award of attorney's fees in proceedings to modify a child support award or parenting time order is within the sound discretion of the trial court and will be reversed only upon a showing of a clear abuse of that discretion. Sutton v. Sutton, 773 N.E.2d 289, 298 (Ind. Ct. App. 2002). In assessing attorney's fees, the trial court may consider such factors as the resources of the parties, the relative earning ability of the parties, and other factors that bear on the reasonableness of the award. Id. Furthermore, any misconduct on the part of one of the parties that directly results in the other party incurring additional fees may be taken into consideration. Id.

Here, Father has the greater economic resources. Mother was found in contempt of court for violating the parenting time provisions of the Dissolution Decree. However, the trial court also found misconduct on Father's part. Moreover, while Father testified that he had incurred \$4,000.00 in attorney's fees, he did not attempt to demonstrate what portion of

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<sup>5</sup> We observe that Father's Exhibit C (which did not reflect a deviation based on tax rate) proposed that his child support should be \$268.05 weekly, and the new child support order is \$276.19, a difference of \$8.14.

those fees were incurred to file and prosecute motions for contempt. We find no clear abuse of the trial court's discretion in its refusal to award Father attorney's fees.

### **Conclusion**

Father has demonstrated no abuse of discretion in the trial court's modification of parenting time and child support. Nor has Father demonstrated his entitlement to an award of attorney's fees.

Affirmed.

VAIDIK, J., and BARNES, J., concur.